No. 14,348

United States Court of Appeals

For the Ninth Circuit

MARIO BALESTRERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant was found guilty by jury verdicts after trial in the United States District Court for the Northern District of California, Southern Division, of violations of the Jones-Miller Act (21 U.S.C. 174), concealment of heroin, and of Section 371 of Title 18 in that he conspired with others to violate the provisions of the so called Jones-Miller Act and the Harrison Narcotic Act (26 U.S.C. 2553 and 2557).

The indictment was in 24 counts, the defendant being charged with the substantive offense in count nine and with the conspiracy in count twenty-four. (T.R. 3-29.)

Appellant was sentenced to a term of three years' imprisonment on each count the sentences to begin and run concurrently, and to a fine of $1 on count nine. (T.R. 30-31.) Judgment was imposed September 4, 1953. No appeal was taken.

On March 11, 1954, appellant filed a motion for a new trial on the ground of newly discovered evidence. (T.R. 32-33.) An affidavit in support thereof was filed with said motion. (T.R. 33-48.) No counter-affidavit was filed. After argument, the Court, without hearing any testimony, made its order denying the motion for new trial. (T.R. 49-50.)

A timely notice of appeal was filed (T.R. 52). (Rule 37(a), Federal Rules of Criminal Procedure.) The jurisdiction of this Court to review the order of the District Court is sustained by 28 U.S.C. Sections 1291, 1294.

STATEMENT OF THE CASE.

Appellant was indicted in the United States District Court for the Northern District of California, Southern Division. The indictment was in twenty-four counts. Altogether it named twenty-three defendants and three other persons were named as coconspirators but not defendants. The twenty-fourth count charged a conspiracy to violate the narcotic laws of the United States on the part of all the defendants and the coconspirators. (T.R. 15-29.)

The ninth count is the only other count naming the defendant and he is charged therein with a viola-

tion of the Jones-Miller Act (21 U.S.C. 174) in that on or about the 23rd day of March, 1951, he concealed a certain quantity of heroin in violation of the Act. (T.R. 7-8.) Appellant entered a plea of not guilty to each of these counts, and after trial by jury was found guilty on both. (T.R. 30.) He was sentenced to three years' imprisonment on each count, the sentences to commence and run concurrently. (T.R. 31.) No appeal was taken.

Approximately six months after sentence the appellant filed a written motion for a new trial on the ground of newly discovered evidence. (T.R. 32.) The motion was supported by an affidavit of defendant's counsel setting forth the factual basis for such motion, what the newly discovered evidence was, and the inability of the defendant to have procured it at the time of his trial. (T.R. 33-48.) This affidavit, with the exhibits attached, covers 15 pages of the printed record. In summary it alleges the following:

> At the trial of the defendant the only witness testifying against him was one Harry Winkelblack; said witness was named in the indictment as a coconspirator but not a defendant; said witness testified in substance that there had been several meetings between the defendant and one of the codefendants, Abraham Chalupowitz, who pled guilty before the trial. He testified that after each of the meetings the codefendant would return to a waiting car with various quantities of narcotics.
>
> The defendant testified on his own behalf and denied the meetings and likewise testified as to

his whereabouts at the times mentioned by the government witnesses; his testimony as to his whereabouts being different than the places testified to by the witness, Harry Winkelback, was corroborated by two disinterested witnesses; the codefendant Chalupowitz was called as a defense witness and he denied the meetings or having any transactions involving narcotics with the defendant.

Approximately six months after appellant's conviction his attorney came into possession of copies of official communications of United States Bureau of Prisons. These documents were attached to and incorporated in the affidavit as Exhibits "A" and "B".

These documents show that the government witness, Winkelblack, testified under duress, promises and threats; that his testimony was biased and prejudiced against the appellant and was knowingly induced by the various agents of the United States Narcotics Bureau and a United States attorney for this district who procured the indictment of defendant.

The documents show that while the witness Winkelblack was in the custody of the United States marshal for this district for the purpose of testifying before the grand jury, he was lodged in the county jails of Solano and Contra Costa Counties, State of California; while so incarcerated and at the insistence of the prosecuting agents of the government, he was permitted to leave his place of confinement and spend weekends at home with his wife; he was permitted to be out of jail at other times; he was permitted

other liberties and privileges denied to other prisoners, including visits by his wife in private quarters without molestation by jail officials.

Said witness informed the agents of the government that if such privileges and freedom were denied him he would refuse to cooperate with the authorities or give the kind of evidence or testimony that they desired. Said witness stated that if he lost such privileges and was confined in jail as other prisoners are, he would refuse to go on with his testimony as a government witness and back out on all the promises made to agents of the government.

The witness was then threatened that in the event that he got stubborn with reference to giving the kind of testimony the government wanted that he should consider the possibility of his being prosecuted by the government for escaping jail on many counts and also the possibility of his wife being involved as harboring an escaped federal prisoner. The idea of federal prosecution on the escape charge itself so impressed the witness that the government agents did not have any fear of his backing down on his testimony.

The affidavit in support of the motion alleged that the testimony of the witness Winkelblack was false, prejudiced and biased and had been induced by agents of the Narcotics Bureau and an assistant United States attorney of this district, by the use of threats, promises and favors as set forth in the exhibits. The affidavit set forth that had such evidence been available at the trial the witness' bias and prejudice would have been established and his credibility destroyed.

No counter-affidavit was filed by the government.

The District Court, Judge Goodman, filed a written order denying the motion for new trial. (T.R. 49-51.) A timely notice of appeal was filed. (T.R. 52.)

SPECIFICATION OF ERRORS RELIED UPON.

1. That the District Court abused its discretion in denying the motion for new trial.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

The District Court abused its discretion in failing to grant appellant a new trial on the uncontroverted showing that the only witness against the appellant was biased and prejudiced in favor of the prosecution as a consequence of promises and threats made to and against him by government officials.

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2. THE MOTION FOR NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE SHOULD HAVE BEEN GRANTED AND ITS DENIAL WAS AN ABUSE OF DISCRETION.

Specifications of Error No. 1.

1. That the District Court abused its discretion in denying the motion for a new trial.

The government offered as its only witness against the appellant an ex-convict who had been previously

convicted of several felonies. (T.R. 55.) In addition he was named as a coconspirator in the present indictment; but not as a defendant. (T.R. 15.) He was not prosecuted by the federal government on any of the charges resulting in this indictment.

At the time he testified before the grand jury that returned the indictment he was serving sentences imposed by California courts for violations of the state narcotic laws. He was, however, in the custody of the United States marshal of this district pursuant to a writ of habeas corpus *ad testificandum* issued for the purposes of his attendance before the grand jury. The manner of exercising custody over him is fully set forth in the affidavits and exhibits.

A reading of these documents shows that the witness' testimony was induced by favors and promises. They likewise reveal that when he indicated he might not testify in the manner that the government officials wanted he was threatened with a possible prosecution for having escaped from federal custody. Although these promises and threats were made while he was appearing before the grand jury, the possibility of prosecution for escape existed at the time of his testimony at the trial.

That such testimony was the result of coercion, duress and inducement is not denied by the government. Neither is it denied that the evidence of such was newly discovered and could not by the exercise of due diligence been presented at the trial. Finally, it is not disputed that his testimony was false and

that the presentation of such evidence at the trial would have destroyed the credibility of this sole witness against the defendant.

Despite these apparent admissions, the trial Court denied the motion for a new trial. The denial was based on two grounds:

(1) That there was no proximate relationship shown between treatment and testimony; or

(2) Even if relationship existed such facts would be no more than impeachment and not of substance requiring the granting of the motion.

In the case of *Hamilton v. United States,* 140 F. (2d) 679 (C.A.D.C.), it was stated that an affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. The Court said that such was especially true where the sole evidence to support a conviction is the word of one witness, in that case the arresting officer.

To say that the affidavit and exhibits filed with this motion fail to show a relationship between the threats and promises and the testimony is not a fair construction of the affidavit.

It is fundamental that any witness may be impeached by proper means. One generally accepted method is to show that promises or threats have been made to or against the witness. This is especially true of accomplices. The simple reason for the rule is that there is a clear proximate relationship between the witness' testimony and what factors compelled it.

Thus, in the recent case of *Gordon v. United States,* 344 U.S. 414, 73 S.Ct. 369, the unanimous Court reversed a conviction where the trial Court unduly restricted efforts of the defense to introduce evidence of impeachment. Part of the impeaching evidence consisted of a statement made to the witness, who was an accomplice, by another judge at the time he entered a plea and his sentence was deferred. The Supreme Court made this statement, which is particularly appropriate in this case:

> "Where the Government's case in a criminal prosecution stands or falls on the jury's belief or disbelief of one witness, that witness' credibility is subject to close scrutiny."

Certainly had the information contained in the documents filed with the motion for new trial been available at the time of trial, failure to permit cross-examination thereupon would have been error.

The second reason advanced by the trial Court for denying the motion was that at most the evidence was in the nature of impeachment. Recognizing that such is the rule, it is submitted that the evidence here newly discovered is more than mere impeachment.

Here, the government's case stood or fell on the testimony of the witness Winkelblack. If evidence severely questioning his credibility or destroying it was available, the government's case would have been weakened or destroyed.

Admittedly there was no other evidence to support the conviction. In the case of *United States v. On*

Lee, 201 F. (2d) 722 (C.A. 2d), a new trial was sought on the ground of newly discovered evidence affecting the credibility of a government agent. The majority opinion held that the new evidence merely lessened his credibility and stated that even without it the other evidence was sufficient to sustain the conviction.

Judge Frank in his dissenting opinion pointed out the distinction between new evidence that is merely impeaching and that which warrants the granting of a new trial. He pointed out that where the evidence sought to be impeached is the very evidence that led to the conviction, that a new trial should be granted. He stated:

> "Surely we should grant a new trial when at such a trial that very testimony, because of newly discovered material, would not be offered by the government or, if offered, almost certainly would not be believed by the jury. For, on that basis, the new evidence would probably produce an acquittal."

It is submitted that on the facts the newly discovered material here presented is more than mere impeachment but is destructive of the government's case.

CONCLUSION.

It is submitted that the motion for new trial was meritorious and the Court abused its discretion in denying it. The evidence was newly discovered, its

discovery was diligent, it was material, was not merely cumulative or impeaching and its introduction at a new trial would probably produce an acquittal.

Dated, San Francisco, California,
October 18, 1954.

Respectfully submitted,
JAMES E. BURNS,
Attorney for Appellant.